

**Document Log Item****Addressing****From**

Charles Openchowski/DC/USEPA/US

**To**

Susan Stahle/DC/USEPA/US@EPA

**CC**

Carrie Wehling/DC/USEPA/US@EPA  
Earl Salo/DC/USEPA/US@EPA  
Elliott Zenick/DC/USEPA/US@EPA  
John Michaud/DC/USEPA/US@EPA  
Lee Tyner/DC/USEPA/US@EPA  
Mary-Kay Lynch/DC/USEPA/US@EPA  
Mindy Nigoff/DC/USEPA/US@EPA  
Richard Ossias/DC/USEPA/US@EPA

**BCC****Description****Subject****Date/Time**

Re: Proposed guidance on response to nuclear incidents-we need an issue paper prepared on this proposal - first cut

01/23/2009 06:33 PM

**# of Attachments****Total Bytes****NPM****Contributor**

1

60,139

Lee Tyner

**Processing****Comments** Clear Category Non-responsive Printed**Document Body**

Thanks for sending this along, Susan, not sure I would agree that there are no issues, here are some preliminary reactions (I had not seen this document before now). To begin with, based on a very quick review, there is language in the guidance that could trigger a rule v. guidance problem. I think the D.C. Circuit looks beyond disclaimers and analyzes the actual language in policy documents like this; some statements seem pretty definitive (i.e., "must") and are not qualified by words like "generally" or "may" etc. CCILO has more experience with this but I believe in the GE case a few years ago, it only took one "must" (or other mandatory sounding word/phrase) to create a problem for us. Similarly, the potential overlap with other response authorities that we normally use to address releases of rad is very unclear and could raise legal issues. As near as I can tell, there is no explanation that deals with when this approach is appropriate as opposed to using CERCLA response authorities. Notwithstanding the statement in the disclaimer that this guidance doesn't affect CERCLA and SDWA, the option of using this approach does have an effect.. Many things in this guidance are very inconsistent with our remedial action program and the statute, NCP and existing guidance we use in that program. The approach in this guidance is not confined to just short-term emergencies, could undermine what


we do at NPL sites (especially federal facility ones involving DOE), how we determine protectiveness, and how we use ARARs like MCLs under the SDWA. As I understand it, this guidance would allow cleanup levels that exceed MCLs by a factor of 100, 1000, and in two instances 7 million, and there is nothing to prevent those levels from being the final cleanup achieved (i.e., it's not confined to immediate response or emergency phase). Similarly, we typically use 15 *millirems* as the level that's within the NCP's cancer risk range – levels in this guidance measured in *rems* probably would make DOE/PRPs happy but would not be considered protective by our CERCLA remedial program standards and would undermine our Superfund cleanup decisions, as well as oversight and enforcement (including potentially both private party/cost recovery and federal facility agreements under CERCLA section 120). Having a simple phrase in the disclaimer that this doesn't affect Superfund will not keep DOE and others from using this document as a legal weapon (e.g., we are being arbitrary under CERCLA when ORIA has determined different cleanup levels that are protective). I'll be happy to go into more detail, just wanted to get you an initial reaction. thanks

Susan Stahle      ~~Attached is a first cut. Please send me any com...~~      01/23/2009 03:50:35 PM

Susan Stahle/DC/USEPA/US

01/23/2009 03:50 PM

To Lee Tyner/DC/USEPA/US@EPA, Carrie Wehling/DC/USEPA/US@EPA, Mindy Nigoff/DC/USEPA/US@EPA  
cc Charles Openchowski/DC/USEPA/US@EPA, Earl Salo/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA, Richard Ossias/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Elliott Zenick/DC/USEPA/US@EPA

Subject Re: Proposed guidance on response to nuclear incidents-we need an issue paper prepared on this proposal - first cut 

Attached is a first cut. Please send me any comments by Monday at 10:00 am. Thanks.

Mary-Kay--I hope this is what you had in mind; wasn't really sure from the email below so I took a stab and guessed a lot. :)



Issue paper for PAG Manual.doc

Susan Stahle  
Air and Radiation Law Office (Rm 7502B)  
Office of General Counsel  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (ARN: MC 2344A)  
Washington, D.C. 20460  
ph: (202) 564-1272  
fax: (202) 564-5603  
stahle.susan@epa.gov

Mary-Kay Lynch      ~~Can ARLO take the lead on preparing an issue p...~~      01/23/2009 12:41:36 PM